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GENOCIDE IN GAZA: the legal controversy of the Council of the European Union's failure to act

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The European Union (EU) and its member states have a moral and legal obligation to act in the face of serious human rights violations (war crimes, crimes against humanity and possibly genocide) by the State of Israel in the Gaza Strip.

The failure to act by the Council of the EU affects the bloc's legal order and its basic principles, including the primacy of fundamental rights, as laid down in the articles of the EU-Israel Association Agreement and in the European treaties.

Any member state could bring the action for failure to act provided for in Article 265 TFEU.

The central argument of this article is that in the face of such evident and serious human rights violations as those currently taking place in the Gaza Strip – including war crimes, crimes against humanity and possibly genocide – the European Union (EU) and its member states have a legal obligation to act with every means at their disposal, as established in the [EU-Israel Association Agreement](#) and the European treaties.

The exception to the jurisdiction of the Court of Justice of the EU (CJEU) relating to the review of Common Foreign and Security Policy (CFSP) action cannot be

applied in an automatic, broad and absolute manner in this case. There are at least three legal bases that allow bringing an action for failure to act before the CJEU: (a) impact on fundamental rights; (b) need for CFSP consistency with other EU policies; and (c) the judicial review of mixed international agreements and their application.

Impact on fundamental rights

Crimes against humanity and possible genocide

From the outset of the Israeli offensive on Gaza following the terrorist attacks perpetrated by Hamas on October 7, 2023, countless United Nations bodies and agencies, development NGOs and journalists have denounced serious and systematic violations of international humanitarian law (IHL) and human rights on the part of the State of Israel. The EU, under its treaties and the [Euro-Mediterranean Agreement](#) establishing an EU-Israel association (signed in 1995 and in force since 2000), has not only a political and moral obligation but also a legal duty to respond to this ongoing series of war crimes and crimes against humanity, of a scale – and shamelessness in their commission – that is difficult to compare.

This includes the indiscriminate bombing of civilian areas, forced displacement of the population and the use of hunger as a weapon of war. Accordingly, [the International Criminal Court](#) (ICC) on November 21, 2024, issued international arrest warrants for the prime minister of Israel, Benjamin Netanyahu, and his former defence minister, Yoav Gallant, accusing them of the war

crime of starvation as a method of warfare and crimes against humanity – including murder, persecution and other inhumane acts – committed in the offensive on Gaza between October 8, 2023, and May 20, 2024.

Multiple human rights experts and United Nations rapporteurs have even described the offensive as a possible act of genocide; particularly the United Nations special rapporteur on the situation of human rights in the occupied Palestinian territories, Francesca Albanese, **who said that there are** “reasonable grounds” to believe that acts of genocide are being committed according to the **Convention on the Prevention and Punishment of the Crime of Genocide** of 1948. The International Association of Genocide Scholars, for its part, said that **genocide was being committed**. On September 16, 2025, a United Nations independent international commission of inquiry concluded that **genocide was being committed** in the Gaza Strip.

It is important to remember that the mission of the above-mentioned convention of 1948 is, as its name indicates, not only to punish genocide but also to prevent it. The 27 member states of the EU are parties to

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this treaty. In addition, the EU adopted **Council Regulation (EU) 2020/1998** of December 7, 2020, concerning restrictive measures against serious human rights violations and abuses, the scope of which includes genocide.¹

Similarly, in the framework of the case brought by South Africa against the State of Israel in December 2023 for violation of the **Convention on the Prevention and Punishment of the Crime of Genocide** – and which states such as Spain, Ireland, Turkey or Colombia have joined – the United Nations **International Court of Justice (ICJ)** issued provisional measures on January 26, 2024. It recognised that the acts alleged by

South Africa were liable to fall within the framework of the provisions of the convention and ordered Israel to prevent genocidal acts and allow the entry of humanitarian assistance.

The human rights clause in the association agreement and its violation

Article 2 of the **Euro-Mediterranean Agreement** establishing an association between the EU and Israel states literally: “Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and *constitutes an essential element* of this Agreement”. Accordingly, Article 79 of the same agreement² enables taking measures in the event of a violation of this essential clause, as does **Article 218(9)** of the Treaty on the Functioning of the EU (TFEU), under which “The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.”

On February 14, 2024, the prime minister of Spain, Pedro Sánchez, and the taoiseach of Ireland, Leo Varadkar, sent a **joint letter** to the president of the European Commission, Ursula von der Leyen, calling on the commission to urgently examine whether Israel was fulfilling its obligations regarding human rights enshrined in the EU-Israel Association Agreement, in particular the clause which requires respect for democratic principles and human rights as an essential element of the relationship. In the letter, the leaders note the gravity of the military offensive in Rafah, decry the large number of civilian victims in Gaza and call for respect for international humanitarian law and human rights. They also ask,

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1. Particularly Article 2.1 (Subject Matter):

In accordance with this Regulation, restrictive measures shall be imposed against: (a) natural or legal persons, entities or bodies responsible for, involved in or associated with serious human rights violations and abuses worldwide, including: genocide, crimes against humanity, serious human rights violations or abuses (such as torture, slavery, extrajudicial, summary or arbitrary executions, enforced disappearance of persons, arbitrary arrests or detentions); (b) natural or legal persons, entities or bodies associated with the persons, entities or bodies referred to in point (a).

2. “1. The Parties shall take any general or specific measures required to fulfil their obligations under this Agreement. They shall see to it that the objectives set out in this Agreement are attained.

2. If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before doing so, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. In the selection of these measures, priority shall be given to those which least disturb the functioning of this Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests”.

if Israel were found to be in breach, that the commission propose appropriate measures to the council. At that time, however, the commission failed to follow up the initiative.

On August 29, 2024, the high representative of the EU for foreign affairs and security policy, Josep Borrell, asked the member states to consider imposing sanctions on two Israeli ministers – the national security chief, Itamar Ben-Gvir, and the finance minister, Bezalel Smotrich – **for their statements** described as “hate messages” against Palestinians and for incitement which, according to Borrell, could be in breach of international humanitarian law. The proposal was not adopted for lack of consensus among the member states.

On November 18, 2024, the high representative again **presented the Foreign Affairs Council** of the EU with a proposal to suspend political dialogue with Israel, invoking the human rights clause of the EU-Israel Association Agreement, owing to “grave concerns about possible violations of international humanitarian law in Gaza”. The proposal was not approved by the member states, however, since it required unanimity and the majority chose to continue maintaining regular diplomatic relations with Israel.

Later, in June 2025, **a report** drawn up by the European Commission and the European External Action Service (EEAS) concluded, albeit employing euphemistic language, that Israel was in continued and serious breach of the clause. Then, on July 14, the current high representative, Kaja Kallas, presented the Council of the EU with a **list of ten options** to address the breaches of Article 2 of the association agreement by Israel. They included the total or partial suspension of the agreement, freezing the process of trade liberalisation, the suspension of political dialogue, visa restrictions (ending visa-free travel), suspending technical and scientific cooperation (such as Horizon Europe), sectoral embargos (including arms) or selective individual sanctions on several ministers in the Israeli cabinet. A few days later, on July 29, the European Commission **announced that it was proposing the partial suspension** of Israeli participation in Horizon Europe, restricting access to the Accelerator of the European Innovation Council (EIC), as it considered there were reasonable doubts about Israel’s fulfilment of Article 2. For this measure to take effect, it would require the backing of a qualified majority in the council, which has yet to materialise.

More recently, on September 17, 2025, the European Commission, with the participation of High Representative Kaja Kallas, **presented the College of Commissioners with a package of proposals** the backbone of which is the partial suspension of trade concessions under the EU-Israel Association Agreement in response to the breach of Article 2. The proposed measures include, as well as sanctions on Israeli ministers categorised as “extremist” (Itamar Ben-Gvir and Bezalel Smotrich among them), sanctions on violent settlers, putting on hold the EU’s bilateral support to the government of Israel – with the exception of cooperation with Israeli civil society and the Yad Vashem memorial – and the suspension of the trade-related provisions of the agreement that grant preferential tariffs. If the suspension of the trade dimension is to take effect, it will require a decision from the Council of the EU with a qualified majority. The personal sanctions need a decision by unanimity.

To date, however, the council **has not adopted any of these measures** and is thus engaging in a clear and ongoing case of institutional inaction. We must bear

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in mind that the legal obligation to act transcends the association agreement, as it forms part of EU primary law (that is, it is constitutional in nature). Various provisions of the treaties stipulate taking action in the face of serious violations of fundamental rights (**Consolidated version of the TEU**, particularly Articles 2, 3, 11 and 21 TEU; and Articles 205 and 220 TFEU). It is essential, firstly, to consider **Article 2 of the Treaty on European Union (TEU)**, which lists the EU’s values – respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities – and must guide all its policies.

Likewise, **Article 3 TEU** explicitly obliges the bloc not only to respect but promote international law as a guiding principle of its external action, imposing on the EU the duty to contribute “to the strict observance and the development of international law”, particularly the principles of the United Nations Charter. Similarly, Article 21(1) provides that the EU’s international action will be based on “respect for the principles of the Unit-

ed Nations Charter and international law”.³ This is reiterated in Article 205 TFEU: “The Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union”.

This twofold normative basis reinforces the conclusion that the EU has legal obligations in the face of mass violations of international humanitarian law like those seen in the Gaza Strip.⁴ These references to the highest law of the bloc’s legal order, together with the association agreement, oblige the EU to direct its action towards enforcing all international rules on the protection of human rights. The failure to act on the part of the council, then, while it is a political decision, transcends mere choice within the political sphere and constitutes a breach of several provisions of its legal order. This holds unless it is considered legitimate to refrain from using every available means – such as suspending trade relations and arms supplies – in view of the commission of crimes against humanity, including an attempt to carry out ethnic cleansing and genocide. We are, then, in the realm of an obligatory act on the part of

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council, where its political discretion might affect the determination of the concrete measures to be adopt-

ed but not to the point where no decision is taken for reasons of *realpolitik*, since such an omission would constitute a violation of EU law.

Possible paths before the CJEU: rights as a limit on the exception to the jurisdiction over the CFSP

That said, establishing there is a legal obligation to act in the face of a possible genocide is not much good if that obligation, though it clearly exists, cannot be controlled jurisdictionally.

While the TFEU limits the Court of Justice’s jurisdiction on CFSP matters under [Article 275](#), this exclusion is not absolute, since the article specifies that “the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union”, in accordance with Article 24(1) TEU. According to the CJEU, this article must be interpreted restrictively to ensure a balance between the protection of rights and the autonomy of the EU’s external action. Thus, in [the Rosneft case \(C-72/15\) of March 28, 2017](#),⁵ the court ruled that the exclusion of its jurisdiction established in the CFSP cannot be interpreted broadly, as it would limit the fundamental right of effective judicial protection (Article 47 of the [Charter of Fundamental Rights of the EU](#)⁶). The court

concluded that the exception to the jurisdiction must be applied narrowly, reserved only for strictly political or strategic action of the CFSP. Meanwhile, restrictive measure that directly affect natural or legal persons – such as economic sanctions – are

fully reviewable so that private individuals are not left unprotected in the face of EU decisions on matters of external action.

In [Elitaliana SpA v Eulex Kosovo \(C-439/13 P\)](#), the CJEU declared it had jurisdiction because the proceedings did not challenge purely political or military decisions rather it was a contractual dispute arising from a contract for the provision of a helicopter service entered into by the [Eulex Kosovo mission](#). The court maintained that when the EU acts on an administrative or contractual level, even when it is in the framework of the CFSP, its action is subject to judicial review under Articles 263 and 340 TFEU, since it is a

3. 1. The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. 2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;
(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris;
(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
(g) assist populations, countries and regions confronting natural or man-made disasters; and
(h) promote an international system based on stronger multilateral cooperation and good global governance.

4. As well as, if that were not already enough, the regulatory requirement arising from the previously cited Council Regulation (EU) 2020/1998 of December 7, 2020.

5. “The principle of effective judicial protection . . . implies that the exclusion of the Court’s jurisdiction in the field of the CFSP should be interpreted strictly”.

6. “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

matter of the management of EU resources and not one of determining foreign policy itself. In **Judgment KD and KS v the Council and Others** (C-29/22 P and C-44/22 P), the CJEU again affirmed its jurisdiction despite the CFSP framework, as it was an action for damages arising from omissions of the Eulex Kosovo mission that directly affected the fundamental rights of the claimants. The court ruled that the administrative omissions did not constitute political decisions rather executive actions subject to judicial review, distinguishing between political or strategic action of the CFSP, which is not subject to judicial review, and administrative or executive actions that affect individual rights, which can indeed be subject to an appeal. In addition, it reiterated that excluding judicial review would have violated the right to effective judicial protection recognised in **Article 47** of the Charter of Fundamental Rights of the EU.

In the case under analysis, it is clear that the omission on the part of the council in the face of serious rights violations in the Gaza Strip has direct consequences on the life, physical integrity and legal protection of the persons concerned; rights which are also covered by the charter. Yet at the same time the decision (or lack thereof) regarding punitive measures on the State of Israel would seem to constitute an act of a strategic or political nature that, according to the court, would remain exempt even when it affects fundamental rights. In fact, the advocate general in **KD and KS** suggested that fundamental rights and, in particular, the Charter of Fundamental Rights should function as the red line of the exemption from jurisdiction provided for in Article 275 TFEU, permitting review even of political or strategic action when it seriously affects those rights.

The CJEU, however, maintained a more cautious position, reaffirming the line of *Rosneft* and *Elitaliana*: the exception to the jurisdiction over the CFSP should be applied narrowly, but it continues to exclude review of action of a political or strategic nature, even though it may impinge on fundamental rights. In the three cases, the court could exercise its jurisdiction precisely because the contested acts were described as executive or administrative and not as political decisions in the strict sense. It is a doctrine, however, that the CJEU could revise in view of the seriousness of the case in question.⁷ In conclusion, no act or omission can remain

exempt from judicial review when it directly affects fundamental rights, especially in the context of serious human rights violations arising from the application of international agreements.

CFSP consistency with other EU policies

There is another legal basis for CJEU intervention in the face of the grave situation of human rights violations in the Gaza Strip. Article 40 TEU provides that the implementation of the CFSP cannot impinge on the exercise of EU competences under Article 3 to 6 TFEU, that is: “The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter”.

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Among those powers is humanitarian aid (**Article 4(4) TFEU**),⁸ which is also regulated in **Article 214 TFEU**,⁹ defining EU external action on matters of relief and protection for civilian populations who are victims of conflicts. The council’s failure to act in the face of the systematic blocking of humanitarian aid into the Gaza Strip on the part of Israel means the CFSP and this common policy clash head-on, constituting a breach of the

29–51).

8. “In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs”.
9. Namely: “1. The Union’s operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union. Such operations shall be intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from those different situations. The Union’s measures and those of the Member States shall complement and reinforce each other. 2. Humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination”.

7. On this debate, see, amongst others: Lonardo (2024: 267–275) and Heliskoski (2023:

principle of institutional consistency. It is clear that the absence of decisions on the part of the council regarding effective measures to exert pressure on the State of Israel is impeding the distribution of humanitarian aid in the Gaza Strip.

The EU's competence in trade policy would be in exactly the same situation. This policy is the exclusive competence of the EU under Article 3(1)(e) TFEU: "1. The Union shall have exclusive competence in the following areas . . . (e) common commercial policy", which is also included under Article 40. It must be consistent with the established fundamental values of external action, particularly respect for human rights. Maintaining full trade relations with a state that is committing mass violations of international humanitarian law is a breach of that consistency, and, as previously mentioned, it contributes to the failure to distribute humanitarian aid effectively.

Given this, **Article 215 TFEU** empowers the council to adopt – by a qualified majority – restrictive measures, including the interruption of trade relations, as a means of responding to breaches of the essen-

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tial values that underpin EU foreign and trade policy, providing there is a prior decision from the council, which, in the case under analysis, is what is missing: "Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof" (Article 215(1)).

In conclusion, given that Article 275 TFEU does indeed recognise the court's jurisdiction to review respect for Article 40 TEU regarding acts or omissions of the CFSP, this opens a specific jurisdictional path to challenging the council in defence of respect for EU primary law.

Judicial review of international agreements and their application

The CJEU has the authority to carry out judicial review in accordance with Article 216(2) TFEU ("Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States"), in connection with **Article 19 TEU** ("The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. *It shall ensure that in the interpretation and application of the Treaties the law is observed*") and the aforementioned principle of effective judicial protection (Article 47 of the Charter of Fundamental Rights). Similarly, CJEU case law has confirmed that the association agreements concluded by the EU are subject to judicial review, both regarding their validity and their interpretation.

In **Council v Front Polisario** (C-104/16 P, EU:C:2016:973), the court admitted the action for annulment brought against the council decision approving the conclusion of the agricultural agreement between the EU and Morocco, as it potentially affected the rights of third parties and compliance with international law, a doctrine which

was reiterated in **C-266/16 Western Sahara Campaign UK** (EU:C:2018:118), on the association and fisheries agreements between the EU and Morocco. In **X/Raad van bestuur van de Sociale verzekeringsbank** (C-549/22, EU:C:2023:970), the court addressed the interpretation of provisions of an association agreement in the framework of the application of indi-

vidual rights in the member states, reiterating that such agreements form part of the EU's legal order and are subject to judicial interpretation.

Therefore, the EU-Israel Association Agreement, which includes chapters on trade, scientific, economic and social cooperation, as well as a clause on human rights, would be subject to CJEU review as far as its execution and application (or lack thereof) is concerned. In other words, the council's failure to act in itself leads to an infringement of Article 2 of the agreement that states that respect for human rights is an essential part of it, which certainly can and must be subject to judicial review.

It is therefore possible to bring the action for failure to act provided for in Article 265 TFEU, since there is a clear legal obligation to act and a failure to do so which affects the EU's legal order and its basic principles, including the primacy of fundamental rights. This action could be brought against the council by any member state.

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